

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

JOHNATHAN D. WISHNESKI,

Plaintiff,

v.

No. 12-cv-00540-JCH-CG

DR. JOSE ANDRADE and
LIEUTENANT BUCKALOO,

Defendants.

ORDER GRANTING MOTION TO VACATE SCHEDULING ORDER

THIS MATTER comes before the Court on Defendant Andrade's *Motion to Vacate Scheduling Order*, (Doc. 6). Defendant recently removed this case from the Fifth Judicial District Court in New Mexico. (Doc. 1). While Defendant Andrade was only recently served with a copy of the summons and complaint, it appears that Plaintiff and Defendant Buckaloo litigated for some time in state court. (See, *generally*, Doc. 2). During that time New Mexico District Judge Mark Sanchez entered a *Minute Scheduling Order* establishing discovery and trial deadlines. (Doc. 6 at 1-2; Doc. 6-2 at 1). Discovery was supposed to conclude on June 15, 2012, with pretrial motions and proposed findings of fact and law to follow. (Doc. 6-2 at 1-2). Because of the removal to federal court and Defendant's late entry in the case, Andrade requests that the Court vacate the state court's scheduling order. Since filing the motion, Defendants have continued to file notices in compliance with the scheduling order. (Doc. 7 (Defendant Andrade's witness list); Doc. 10 (Defendant Buckaloo's witness list)).

Civil cases brought by an incarcerated prisoner under 42 U.S.C. § 1983 are excluded from the usual pretrial management and discovery deadlines. See D.N.M.LR-Civ.

16.3(d). Rather than order discovery, the more common procedure in § 1983 cases is for the Court to order the production of a comprehensive *Martinez* report to help establish the legal and factual nature of Plaintiff's claims. *Hall v. Bellmon*, 935 F.2d 1106, 1009 (10th Cir. 1991) (Stating that the purpose of a *Martinez* report is to "develop a record sufficient to ascertain whether there are any factual or legal bases for the prisoner's claims.").¹ Because this Court has not entered a discovery scheduling order or established a date for trial, this Court will grant Defendant Andrade's motion and vacate the state court's scheduling order.

IT IS THEREFORE ORDERED that Defendant Andrade's *Motion to Vacate Scheduling Order*, (Doc. 6), be **GRANTED**. New Mexico District Judge Mark Sanchez's *Minute Scheduling Order* is hereby vacated.

A handwritten signature in black ink, appearing to read 'Carmen E. Garza', with a long horizontal line extending to the right.

THE HONORABLE CARMEN E. GARZA
UNITED STATES MAGISTRATE JUDGE

¹ The Court notes that Defendant Buckaloo has already filed a motion for summary judgment against Plaintiff which has been fully briefed and is ready for resolution.